Supreme Court, U.S.
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82-1234

No. _____

In the

Supreme Court of the United States

OCTOBER TERM, 1982

JAMES PARKER, Individually and as Administrator of the Estate of JAY PARKER and SHIRLEY PARKER, Individually and as Mother and Natural Guardian of JAY PARKER,

Petitioners,

-against-

THE COUNTY OF NASSAU, THE NASSAU COUNTY POLICE DEPARTMENT, OFFICER DENNIS BOYLE and OFFICER JOHN TALT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Second Circuit erred in affirming the District Court's dismissal of the petitioner's complaint alleging violation of civil rights against the defendant Nassau County, for the death of petitioner's son who was shot by a County police officer in the course of an attempted arrest?

2. Whether the Court of Appeals erred in affirming the District Court's use of a special jury verdict form which improperly restricted the issue to be decided by the jury?

3. Whether the Court of Appeals erred in affirming the District Court's order quashing a subpoena duces tecum for the production of the F.B.I. file regarding an investigation into the death of Jay Parker?

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IN THE

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JAMES PARKER, Individually and as Administrator of the Estate of JAY PARKER and SHIRLEY PARKER, Individually and as Mother and Natural Guardian of JAY PARKER,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS IN COURTS BELOW

The unpublished memorandum and order of the United States District Court for the Eastern District of New York (Pratt, J.) dated April 14, 1982, directing the entry of judgment dismissing the complaint is reproduced at p. 15a.

The unpublished order of the United States Court of Appeals for the Second Circuit, dated October 21, 1982, affirming judgment, is reproduced at p. 20a.

JURISDICTIONAL STATEMENT

The judgment of the United States District Court for the Eastern District of New York was entered on April 22, 1982.

The United States Court of Appeals for the Second Circuit affirmed

on October 21, 1982.

Jurisdiction is conferred on this Court pursuant to Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE

Title 42 United States Code, Section 1981: Equal Rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

Title 42 United States Code, Section 1983: Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 C.F.R. Part 16, Sections 16.21, 16.22, 16.24 (reproduced in Appendix).

STATEMENT OF THE CASE

Petitioners brought an action in the United States District Court for the Eastern District of New York under 42

U.S.C. Section 1983, seeking damages arising from the death of their son, who was shot and killed by a Nassau County Police Officer during the course of an attempted arrest. The named defendants included the county and the police department, as well as the individual officers who participated in the arrest. The plaintiffs contended that the death of Jay Parker was the result of the use of excessive force by an inadequately trained officer.

During the course of the proceedings, several rulings were made by the trial court which petitioner contends had the cumulative effect of denying petitioners a fair trial, and which departed from the accepted and usual course of judicial proceedings.

Jay Parker, a black youth who was fifteen years old at the time of his death, was the son of a New York City police detective. On the evening of Feb-

ruary 9, 1980, he and a companion had been accused by four whites of attempting to rob them with an inoperable pellet gun outside a movie theater in a Nassau County shopping mall. Earlier that evening four white youths had been ejected from the theater by the security guards there, who know the four to be troublemakers and who refused to take any action regarding the alleged robbery attempt. However, a bystander, after making a racist remark, summoned the police. Both the security personnel and the police officers had been informed that Parker was carrying a pellet gun. Accompanied by the four white youths, Officers Boyle and Talt set off in an unmarked station wagon in search of Parker and his companion. They were spotted walking over a highway bridge in Queens. The officers jumped out of their car. Talt drew his weapon and took cover, which is the proper

police procedure. Boyle approached the boys with his gun drawn and ordered them to step over to the car and put their hands on the car. Parker, with the pellet gun in his left jacket pocket, did not comply. After the officer repeated his order, Parker withdrew only his right hand. The officer placed his left hand on Parker's left shoulder, put his gun to Parker's back, and again ordered Parker to remove his hand from his pocket. Parker slowly withdrew his hand from his pocket, and as he did so, the butt of the gun, which was too large to fit in the pocket, became visible. Officer Boyle fired two shots into Parker's back. The first shot entered Parker's stomach and was not fatal. The second, fatal shot entered his heart. He was pronounced dead upon arrival at the hospital.

ARGUMENT

It is petitioners' respectful contention that certain rulings by the District Judge in the case at bar, as upheld by the Second Circuit, give rise to important questions of federal law which have not, but should be settled by this Court, and which had the cumulative effect of depriving petitioners of a fair hearing by the jury.

First, the District Judge granted defendants' motion to dismiss the action as against the County at the close of the evidence for failure to make a prima facie case. This determination, involving municipal liability under the Civil Rights laws, was upheld by the Second Circuit relying upon Owens v. Haas, 601 F.2d 1242 (2d Cir., 1979), cert. denied, 444 U.S. 980 (1980). Petitioners contend that the issue was one which should have been deci-

ded by the jury subject to the court's review upon a motion for judgment n.o.v.

The issue of a municipal corporation's liability under 42 U.S.C. Section 1983 for the conduct of its agents and employees has been the subject of intensive judicial activity since this Court's landmark decision in Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In Monell, the Court overturned Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) and held that municipalities, as "persons" within the meaning of Section 1983, must answer in damages for civil rights violations. Although the doctrine of respondent superior was rejected in civil rights actions, Monell specifically held that liability will attach

> where...the action that is alleged to be unconstitutional implements or executes a policy

> statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other §1983 'person' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to a governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels.

Monell, 436 U.S. at 690-691, 98 S.Ct. at 2035-2036. The Second Circuit reached the conclusion in Turpin v. Mailet, 579 F.2d 152, that

> ...a damage action can be maintained against a municipality to redress injuries resulting from those actions of its employees that have been authorized, sanctioned, or ratified by municipal officials or bodies functioning at a policy-making level.

579 F.2d at 164. Thereafter, in Owens v. Haas, 601 F.2d 1242 (2d Cir., 1979), the Second Circuit held that municipal liabil-

ity under Section 1983 is not restricted solely to situations where a "violent incident" involving one of its employees is part of a pattern of conduct of which the county has knowledge. Ibid, at 1246. Although simple failure to supervise employees is not sufficient for Section 1983 liability, Owens stands for the proposition that failure to supervise or "lack of a proper training program...so severe as to reach the level of 'gross negligence' or 'deliberate indifference' will give rise to a §1983 cause of action," Ibid. Furthermore, and of particular importance for the case at bar, this Court has held that the "issue of authorization, approval or encouragement is generally one of fact, not law," Turpin v. Mailet, 619 F.2d 196, 199; see also, Stinson v. Sheriff's Department of Sullivan County, 499 F. Supp. 259 (S.D.N.Y., 1980). Consequently, the removal of this issue from

the jury's consideration takes on added significance.

Finally, it must be emphasized in this context that a municipality has no immunity under Section 1983 "and may not assert the good faith of its officers or agents as a defense..." Owen v. City of Independence, Missouri, 445 U.S. 622, 100 S.Ct. 1398, 1409, 63 L.Ed. 673 (1980). The Supreme Court noted that the statute itself does not confer immunity to any officials nor public bodies and, therefore, the high Court has recognized an immunity only where it was historically established at common law at the time the Civil Rights Act was enacted, and where no conflict with the purposes of the act exist. Owen v. City of Independence, supra. Thus, although under Pierson v. Ray, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), individual officers may invoke the defense of probable cause

or good faith in false arrest or malicious prosecution situations such as was present in Turpin, supra, or Owen, supra, no such defense is available to the municipal defendant.

Applying these guiding principles to the ruling by the District Court in the instant case, it is clear that the issue of the liability of these defendants was one for the jury to determine, and that the Second Circuit erred in its conclusion that there was a failure of proof on the issue of the officer's training by the defendant County. On direct examination of Officer Boyle, plaintiff's counsel elicited testimony regarding his training as a police officer. Boyle indicated that, in addition to his initial training, he received additional training in "weapon firing", "arrests under fire", "handcuffing" and "the use of nightsticks". His testimony

as to what, if any, training he received with regard to placing an allegedly armed suspect under arrest was vague at best. The County, having armed this individual and authorized him to use his weapon in the course of his duties, had the responsibility to ensure that the public was properly safeguarded. The issue of potential danger to Boyle (whether real or perceived) was emphasized by the trial court when it allowed the jury to consider only his defense of qualified immunity.

However, the danger to the community of an inadequately trained force of armed police was an issue which was foreclosed when the motion to dismiss was granted in favor of the County of Nassau. This was a question of fact which the jury alone should decide. It is the function of the jury, not the court, to weigh the evidence and evaluate the credibility of witnesses. A properly instructed jury

could have concluded that the County had exhibited "deliberate indifference" or "gross negligence" in its training program within the meaning of Owens v. Haas, supra. Moreover, the jury could also have reached the conclusion that Officer Talt's conduct had contributed to the death of Jay Parker. Had the jury done so, and if the Court disagreed as a matter of law, the option of granting judgment n.o.v. was still available to him. His precipitous action in removing these issues from the jury's consideration was highly prejudicial to the plaintiff and requires a new trial.

Second, at the close of the evidence, the trial court permitted the jury to consider, in the form of a special jury verdict, only the following question:

> Did defendant Boyle reasonably believe that shooting Jay Parker was necessary to protect himself or others from imminent use of deadly force?

It is petitioners' respectful contention that the special verdict form was structured in such a way as to preclude the jury from considering important factual issues involving the propriety of other portions of the officers' conduct during the course of the attempted arrest of Jay Parker, and that this prejudiced the plaintiffs' case so severely as to require that a new trial be granted.

The District Court's initial determination, that the "reasonableness" of Boyle's conduct was in issue, was not fully nor correctly embodied in the special verdict form which was ultimately presented to the jury. Counsel for the plaintiff was not put on notice that the trial court intended to limit the issue of reasonableness to the single act of the actual shooting of Jay Parker by Officer Boyle, and thus he had no opportunity to object. Nevertheless, the Court of

Appeals relied on the absence of an objection in affirming the procedure. Due to the unreasonably narrow structure of the special verdict question, the jury was not permitted to consider whether Boyle was negligent in failing to take cover, as his partner had, or in the manner in which he placed Jay Parker under control. Had they been free to evaluate the totality of the officer's conduct, they could well have concluded that Boyle acted unreasonably prior to the shooting, and that he precipitated the death of Jay Parker by his conduct prior to the actual firing of his weapon. This is consistent with the plaintiffs' theory that Nassau County's training of its police officers was totally inadequate. By the use of the special verdict, the trial court impermissibly stripped the jury of an important aspect of its mandate as trier of the facts, and unreasonably narrowed

their inquiry to such a degree that their verdict did not reflect all of the factual issues raised by the evidence and which should have been placed before them.

Petitioners contend that a question may not be taken from the jury if reasonable men could reach differing conclusions regarding the issue, Baker v. Texas and Pacific Railway Co., 359 U.S. 227, 79 S.Ct. 664, 665, 3 L.Ed.2d 756 (1959); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876 (2d Cir., 1972); Julian J. Studley, Inc. v. Gulf Oil Corporation, 368 F.2d 161 (2d Cir., 1967). Although a special verdict may be used to remove "extraneous" matters from the jury's consideration, Leathers v. United States, 532 F. Supp. 1244, affirmed 471 F.2d 856, cert. den. 412 U.S. 932, 93 S.Ct. 2754, 37 L.Ed.2d 161, the question or questions asked must be "adequate to obtain a jury determination of the factual

issues essential to judgment," R.H. Baker & Co. v. Smith-Blair, Inc., 331 F.2d 506, 508 (9th Cir., 1964). The single question submitted in the case at bar was totally deficient in this respect, and that the error was an abuse of discretion which warrants the granting of a new trial. Petitioners respectfully contend that this procedure, as employed by the District Court and approved by the Court of Appeals, warrants review by this Court.

Third, petitioners contend that an important area of federal law is involved in the ruling by the District Court, upheld by the Court of Appeals, quashing petitioners' subpoena duces tecum for the production of the Federal Bureau of Investigation's file regarding its investigation into the death of Jay Parker. The Justice Department commenced the investigation in order to ascertain whether a violation of Parker's civil

rights had occurred. During pre-trial preparations and approximately four months before trial, petitioners sought, by order to show cause, an order compelling production of the F.B.I. file. After hearing oral argument, the District Court denied the application. Petitioners were advised to pursue the procedure set forth in 28 C.F.R. Part 16 to secure the records from the Justice Department, and did so. The Justice Department declined to make the file available to petitioners. Thereafter, at the time of trial, petitioners caused a subpoena duces tecum to be served upon the Assistant U.S. Attorney who represented the Justice Department during the investigation. The subpoena called for the production of "the entire F.B.I. file regarding the investigation of the death of Jay Parker," and had been marked as a proposed plaintiff's Exhibit. On the return date of the subpoena, the gov-

ernment moved to quash, asserting that after an internal Justice Department review, the government declined to produce the file. The District Court granted the motion to quash. Appellant respectfully contends that in so doing, the District Court denied him access to potential relevant evidence, the importance of which outweighed the government's interests in withholding the information.

At the outset, it should be noted that appellants complied with the provisions of 28 C.F.R. Part 16 after the order to show cause was brought on in District Court in December. It was his request, pursuant to Section 16.22, which set in motion the Justice Department's review alluded to by the District Court in his oral decision granting the motion to quash. Judge Pratt indicated that one of the factors which he considered in ruling on the motion was that the application

> ...came on very late and it was not until the very last minute that the problem was presented to the Court to resolve and the problem had actually begun to arise some three months ago.

However, the appellant attempted to avail himself of the aid of the Court in obtaining the files well in advance of trial. When he was unable to secure the records by means of the procedure set forth in the C.F.R., his only alternative was to issue the subpoena and bring the matter before the Court once again. The "last minute" application was the motion to quash brought on by the Government, not the appellant's request for production of the records.

In granting the motion to quash, Judge Pratt relied upon United States ex rel. Touhy v. Ragen, 340 U.S. 462, 71 S.Ct. 416 (1951), which was also relied upon by the Court of Appeals in affirming the judgment. However, that case con-

cerned contempt of court proceedings which were brought against the agent in charge of the F.B.I. investigation who refused to honor a subpoena duces tecum for production of the records of the investigation. An additional important factual distinction between Touhy and the instant case lies in the government's expressed willingness to cooperate in some measure with respect to the production of the subpoenaed records. In the case at bar, there was no offer of cooperation or of limited disclosure. Furthermore, the Touhy decision merely upheld the validity of the government's internal regulations respecting disclosure. Appellant herein does not dispute the authority of the government to issue such regulations. Rather, it is contended that the record does not contain an adequate showing as to the government's compliance with the applicable part of the C.F.R. and that in the absence

of such a showing, the District Court should not have granted the motion to quash.

In affirming the order of the District Court, the Second Circuit failed to address this important area of conflict between the individual's right to have access to information and the Government's claim to confidentiality. This Court has not passed on the question in the context of a federal civil rights action and Touhy, supra, is not dispositive. Petitioners contend that in the case at bar, involving the death of a young teenager with an unblemished record and exceptional promise, the balance should have weighed in favor of disclosure.

It is petitioners' respectful contention that the cumulative effect of the above rulings, as affirmed by the Court of Appeals, was to prevent a full and fair hearing of this claim for violation of

civil rights. Therefore, it is respectfully submitted that this writ sought herein should be issued and the matter reviewed by this Court.

Respectfully submitted,

ROBERT RIVERS, P.C.
Attorneys for Petitioners

28 CFR Part 16 §16.21 Purpose and Scope

(a) This subpart sets forth procedures to be followed with respect to the production or disclosure of any material contained in the files of the Department, any information relating to material contained in the files of the Department or any information acquired by any person while such person was an employee of the Department as a part of the performance of that person's official duties or because of that person's official status:

(1) In all federal and state proceedings in which the United States is a party and

(2) In all federal and state proceedings in which the United States is not a party, including any proceedings in which the Department is representing a government employee solely in that employee's individual capacity, when a subpoena,

order, or other demand (hereinafter collectively referred to as a "demand") of a court or other authority is issued for such material or information.

(b) For purposes of this subpart, the term "employee of the Department" includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Attorney General of the United States, including U.S. attorneys, U.S. marshals, U.S. trustees and members of the staffs of those officials.

(c) Nothing in this subpart is intended to impede the appropriate disclosure, in the absence of a demand, of information by Department law enforcement agencies to federal, state, local and foreign law enforcement, prospective, or regulatory agencies.

(d) This subpart is intended only to provide guidance for the internal

operations of the Department of Justice, and is not intended to, and does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States.

28 CFR Part 16 §16.22 General prohibition of production or disclosure in Federal and State proceedings in which the United States is not a party

(a) In any federal or state case or matter in which the United States is not a party, no employee or former employee of the Department of Justice shall in response to a demand, produce any material contained in the files of the Department, or disclose any information relating to or based upon material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that person's official status without

prior approval of the proper Department official in accordance with §§ 16.24 and 16.25 of this part.

(b) Whenever a demand is made upon an employee or former employee as described in paragraph (a) of this section, the employee shall immediately notify the United States Attorney for the district where the issuing authority is located. The responsible United States attorney shall follow procedures set forth in §16.24 of this part.

(c) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the responsible United States attorney. Any authorization for testimony

by a present or former employee of the Department shall be limited to the scope of the demand as summarized in such statement.

(d) When information other than oral testimony is sought by a demand, the responsible United States attorney shall request a summary of the information sought and its relevance to the proceeding.

28 CFR Part 16 §16.24 Procedure in the event of a demand where disclosure is not otherwise authorized

(a) Whenever a matter is referred under §16.22 of this part to a United States Attorney, or under §16.23 of the EOUST, or their designees (hereinafter collectively referred to as the "responsible official"), the responsible official shall immediately advise the official in charge of the bureau, division, office, or agency of the Department that was

responsible for the collection, assembly, or other preparation of the material demanded or that, at the time the person whose testimony was demanded acquired the information in question, employed such person (hereinafter collectively referred to as the "originating component"), or that official's designee. In any instance in which the responsible official is also the official in charge of the originating component, the responsible official may perform all functions and make all determinations that this regulation vests in the originating component.

(b) The responsible official, subject to the terms of paragraph (c) of this section, may authorize the appearance and testimony of a present or former Department employee, or the production of material from Department files if:

(1) There is no objection after inquiry of the originating component;

(2) The demanded disclosure, in the judgment of the responsible official, is appropriate under the factors specified in §16.26(a) of this part; and

(3) None of the factors specified in §16.26(b) of this part exists with respect to the demanded disclosure.

(c) It is Department policy that the responsible official shall, following any necessary consultation with the originating component, authorize testimony by a present or former employee of the Department or the production of material from Department files without further authorization from Department officials whenever possible: Provided, That, when information is collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of the Department or by the EOUST, the Assistant Attorney General in charge of such a division or the Director of the

EOUST may require that the originating component obtain the division's or the EOUST's approval before authorizing a responsible official to disclose such information. Prior to authorizing such testimony or production, however, the responsible official shall, through negotiation and, if necessary, appropriate motions, seek to limit the demand to information, the disclosure of which would not be inconsistent with the considerations specified in §16.26 of this part.

(d)(1) In a case in which the United States is not a party, if the responsible U.S. attorney and the originating component disagree with respect to the appropriateness of demanded testimony or of a particular disclosure, or if they agree that such testimony or such a disclosure should not be made, they shall determine if the demand involves information that was collected, assembled, or

prepared in connection with litigation or an investigation supervised by a division of this Department of the EOUST. If so, the U.S. Attorney shall notify the Director of the EOUST or the Assistant Attorney General in charge of the division responsible for such litigation or investigation, who may:

(i) Authorize personally or through a Deputy Assistant Attorney General, the demanded testimony or other disclosure of the information if such testimony or other disclosure, in the Assistant or Deputy Assistant Attorney General's judgment or in the judgment of the Director of the EOUST, is consistent with the factors specified in §16.26(b) of this part exists with respect to the demanded disclosure.

(ii) Authorize, personally or by a designee, the responsible official, through negotiations and, if necessary,

appropriate motions, to seek to limit the demand to matters, the disclosure of which, through testimony or documents, considerations specified in §16.26 of this part, and otherwise to take all appropriate steps to limit the scope or obtain the withdrawal of a demand; or

(iii) If, after all appropriate steps have been taken to limit the scope or obtain the withdrawal of a demand, the Director of the EOUST or the Assistant or Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter, personally or through a Deputy Assistant Attorney General does not authorize the demanded testimony or other disclosure, refer the matter, personally or through a Deputy Assistant Attorney General, for final resolution to the Deputy or Associate Attorney General, as indicated in §16.25 of this part.

(2) If the demand for testimony or other disclosure in such a case does not involve information that was collected, assembled, or prepared in connection with litigation or an investigation supervised by a division of this Department, the originating component shall decide whether disclosure is appropriate, except that, when especially significant issues are raised, the responsible official may refer the matter to the Deputy or Associate Attorney General, as indicated in §16.25 of this part. If the originating component determines that disclosure would not be appropriate and the responsible official does not refer the matter for higher level review, the responsible official shall take all appropriate steps to limit the scope or obtain the withdrawal of a demand.

(e) In a case in which the United States is a party, the Assistant Attorney

General or the Director of the EOUST responsible for the case or matter, or such persons' designees, are authorized, after consultation with the originating component, to exercise the authorities specified in §16.24(d)(1)(i)-(iii) of this part: Provided, That if a demand involves information that was collected, assembled, or prepared originally in connection with litigation or an investigation supervised by another unit of the Department, the responsible official shall notify the other division or the EOUST concerning the demand and the anticipated response. If two litigating units of the Department are unable to resolve a disagreement concerning disclosure, the Assistant Attorneys General in charge of the two divisions in disagreement, or the Director of the EOUST and the appropriate Assistant Attorney General, may refer the matter to the Deputy

or Associate Attorney General as indicated in §16.25(b) of this part.

(f) In any case or matter in which the responsible official and the originating component agree that it would not be appropriate to authorize testimony or otherwise to disclose the information demanded, even if a court were so to require, no Department attorney responding to the demand should make any representation that implies that the Department would, in fact, comply with the demand if directed to do so by a court. After taking all appropriate steps in such cases to limit the scope or obtain the withdrawal of a demand, the responsible official shall refer the matter to the Deputy or Associate Attorney General, as indicated in §16.25 of this part.

(g) In any case or matter in which the Attorney General is personally involved in the claim or privilege, the responsible

official may consult with the Attorney General and proceed in accord with the Attorney General's instructions without subsequent review by the Deputy or Associate Attorney General.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - x

JAMES PARKER, individually and as Administrator of the Estate of JAY PARKER,

Plaintiff,

- against -

THE COUNTY OF NASSAU et al.,

Defendants.

- - - - - - - - - - - - - - - - x

DOCKET NO. CV 81-0466

MEMORANDUM AND ORDER

APPEARANCES:

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AXELROD, CORNACHIO & FAMIGHETTI
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Mineola, New York 11501

PRATT, J.:

Plaintiff brought this §1983 action seeking damages because his son,

Jay Parker, was fatally shot by defendant Boyle in the course of an attempted arrest. At the end of plaintiff's case, the action was dismissed as against defendants Talt and Nassau County on the ground that plaintiff had failed to make out a prima facie case against them.

Plaintiff conceded that defendant Boyle, who actually fired the fatal shots, had probable cause to make an arrest, and Boyle himself conceded that he did fire the shots which cost Parker his life. Consequently, the only issue submitted to the jury was Boyle's defense of qualified immunity. That issue was submitted in the form of a special verdict which inquired:

> Did defendant Boyle reasonably believe that shooting Jay Parker was necessary to protect himself or others from imminent use of deadly force?

After five hours of deliberation the jury answered the question "yes".

Accordingly, the clerk is directed to enter judgment dismissing the complaint against all defendants.

SO ORDERED.

Dated: Uniondale, New York
April 14, 1982.

/s/ George C. Pratt
GEORGE C. PRATT
U. S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - x

JAMES PARKER, individually
and as Administrator of the
Estate of JAY PARKER,

Plaintiff, JUDGMENT

- against- CV 81-0466
(GCP)

THE COUNTY OF NASSAU et al.,

Defendants.

- - - - - - - - - - - - - - - - x

A memorandum and order of Honorable George C. Pratt, United States District Judge, having been filed on April 16, 1982, directing the Clerk of Court to enter judgment dismissing the complaint against all defendants, it is

ORDERED AND ADJUDGED that the plaintiff take nothing of the defendants, and that judgment is hereby entered dismissing the complaint against all defendants.

RICHARD H. WEARE,
Clerk of Court

By: /s/ Robert C. Heinemann
Robert C. Heinemann,
Chief Deputy Clerk

Dated: Brooklyn, New York
April 22, 1982

F I L E D
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D.N.Y.
APR 22 1982

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21 day of October, One Thousand Nine Hundred and Eighty-two.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judge
HON. LAWRENCE W. PIERCE,
Circuit Judge
HON. INZER B. WYATT,
District Judge*

- - - - - - - - - - - - - - - - x

JAMES PARKER, Individually and as Administrator of the Estate of JAY PARKER and SHIRLEY PARKER, Individually and as Mother and Natural Guardian of JAY PARKER,

Plaintiffs-Appellants, ORDER
82-7390

v.

*Of the Southern District of New York, sitting by designation.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

THE COUNTY OF NASSAU, THE NASSAU COUNTY POLICE DEPARTMENT, OFFICER DENNIS BOYLE AND OFFICER JOHN TALT,

Defendants-Appellees.

- - - - - - - - - - - - - - - - x

Plaintiffs appeal from an order of the United States District Court for the Eastern District of New York, Pratt, J., which directed the entry of judgment in favor of all defendants. The complaint against the defendants, County of Nassau and John Talt, was dismissed at the close of the evidence. The complaint was dismissed as against the defendant Boyle following a special jury verdict. We affirm.

A county such as Nassau can be held liable for the constitutional torts of its police officers only if the torts were committed pursuant to some official policy or resulted from grossly negligent or deliberately indifferent lack of train-

ing. Owens v. Haas, 601 F.2d 1242, 1245-46 (2d Cir. 1979), cert. denied, 444 U.S. 980 (1980). Because there was a complete failure of proof on this issue, the complaint as against the County was properly dismissed. The proof conclusively established that Officer Talt did not participate in the shooting of the decedent.

Appellants' contention that the district court abused its discretion in submitting the case to the jury in the form of a special verdict is without merit. No objection was made at the time of submission and there was nothing inherently improper in the practice.

We find no error in the trial court's discretionary evidentiary ruling on the photographs, United States v. Dwyer, 539 F.2d 924, 927 (2d Cir. 1976), or in its order quashing the subpoena of F.B.I. records, see 28 C.F.R. § 16.21 and United States ex rel. Touhy v. Ragen, 340

U.S. 462 (1951).

Affirmed.

/s/ Ellsworth A. Van Graafeiland
Hon. Ellsworth A. Van Graafeiland

/s/ Lawrence W. Pierce
Hon. Lawrence W. Pierce

/s/ Inzer B. Wyatt
Hon. Inzer B. Wyatt

F I L E D
OCT 21 1982
L. DANIEL FUSARO, CLERK
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Office-Supreme Court, U.S.
FILED
FEB 14 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1234

IN THE

Supreme Court of the United States

October Term, 1982

JAMES PARKER, Individually and as Administrator of the Estate of JAY PARKER and SHIRLEY PARKER, Individually and as Mother and natural Guardian of JAY PARKER,

Petitioners,

against

THE COUNTY OF NASSAU, THE NASSAU COUNTY POLICE DEPARTMENT, OFFICER DENNIS BOYLE and OFFICER JOHN TALT,

Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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(516) 535-3005

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982.

JAMES PARKER, individually and as Administrator of the Estate of Jay Parker and SHIRLEY PARKER, Individually and as Mother and Natural Guardian of Jay Parker,

Petitioners,

against

THE COUNTY OF NASSAU, THE NASSAU COUNTY POLICE DEPARTMENT, OFFICER DENNIS BOYLE and OFFICER JOHN TALT,

Respondents.

Brief for Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Opinions in the Courts Below.

The memorandum and order of the District Court, which is not reported, is set out in petitioners' appendix, pages 15A-17A. The judgment dismissing the complaint is reproduced at pages 18A and 19A. The order of the Court of Appeals affirming the judgment which is not reported is set out in petitioners' appendix, pages 20A-23A.

Jurisdictional Statement.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented for the Court to Review.

Whether the Court of Appeals for the Second Circuit erred in affirming the District Court's dismissal of the complaint as to defendants, County of Nassau and John Falt, at the close of the evidence, and as to defendant Boyle following a special jury verdict.

Whether the Court of Appeals erred in affirming the District Court's use of a form of special verdict.

Whether the Court of Appeals erred in affirming the District Court's order quashing a *subpoena duces tecum* for the production of the F.B.I. file regarding its investigation into the death of Jay Parker.

Statutes and Regulations Involved.

The pertinent provisions of the statutes involved include 42 U.S.C. §1981, which is set forth at page 3 of petition; 42 U.S.C. §1983, set forth at page 4 of petition; 28 C.F.R., Part 16, Sections 16.21, 16.22 and 16.24 set forth at pages 1A-14A of petitioners' appendix.

Statement of the Case.

Petitioners brought an action under 42 U.S.C. Sec. 1983 for damages arising out of an incident which took place on February 9, 1980. The summons and verified complaint in the action were served on or about February 19, 1981. The

verified answer was served on behalf of defendants on or about April 23, 1981.

The trial took place before the Honorable George C. Pratt on April 5-April 13, 1982, before the United States District Court for the Eastern District of New York.

At the end of petitioners' case, the action was dismissed as to respondents Talt and Nassau County on the ground that petitioners had failed to make out a *prima facie* case against them. A jury verdict was thereinafter rendered in favor of respondent Boyle. Judge Pratt therefore directed the clerk to enter judgment dismissing the complaint. Judgment was entered ordering and adjudging that the plaintiff take nothing of the defendants and dismissing the case against all defendants.

A notice of appeal was filed on behalf of petitioners as to the order dismissing the complaint against defendants Talt and Nassau County and from the order entered on the jury verdict in favor of defendant Boyle. No notice of appeal was ever filed by petitioners from the judgment of the Clerk of the Court filed on April 22, 1982.

The United States Court of Appeals for the Second Circuit affirmed the determination of the District Court in an order filed October 21, 1982. The order was signed by the Honorable Ellsworth A. Van Graafeiland, Circuit Judge, the Honorable Lawrence W. Pierce, Circuit Judge, and the Honorable Inzer B. Wyatt, District Judge of the Southern District of New York sitting by designation.

The relevant events that took place on the evening of February 9, 1980, are as follows. The decedent, Jay Parker, and a friend, Neal Bell, went to the Green Acres

Shopping Mall in Valley Stream, Long Island. After the two arrived at the Mall, Bell walked over to a white youth and demanded money. The white youth, one Michael Barkolas, refused to give him money and walked off. When he again saw Neal Bell, Barkolas was with friends. Bell again asked for money and, while he did this, Parker displayed his gun. Parker told the boys it was a real gun. Parker and Bell left and the police subsequently arrived, having been summoned to the scene. Barkolas also testified that he and his friends told the police officers that they in fact believed the gun was real.

The four youths got into the car and went to look for the two boys. They pointed them out to the police and Barkolas indicated the tall one (Parker) had the gun. The youths were told to put their hands on the car. Bell complied, Parker did not, he kept his hands in his pockets. Officer Boyle told Parker a minimum of three times to take his hands out of his pockets and put them on the car. Officer Boyle had his hand on Parker's shoulder at that time. Officer Boyle then saw Parker with the gun in his hand, turning toward him. Officer Boyle believed Parker was turning to shoot him. Boyle then fired his gun and, when he saw Parker still coming, fired a second time. Medical assistance was summoned. Detective Ferucci responded to the scene. Jay Parker was taken to Franklin General, the nearest hospital. Jay Parker was pronounced dead at Franklin General Hospital and an autopsy was thereafter performed by the Office of the Medical Examiner, County of Nassau.

ARGUMENT.

Petitioners failed to demonstrate a deprivation of any constitutional rights secured by the constitution and laws.

It is contended by the petitioners that certain rulings by the District Judge in the case at bar as upheld by the Second Circuit give rise to important questions of Federal law which petitioners assert had the cumulative effect of depriving the petitioners of a fair hearing by the jury.

Respondents respectfully submit that petitioners had a fair hearing by the jury and the rulings by the District Court Judge as upheld by the Second Circuit were correct as a mattter of law.

I.

The decision below is clearly correct.

The respondents respectfully submit that the decision of the Court below is clearly correct. The United States Court of Appeals for the Second Circuit took into account *all* of the arguments raised in the petition herein (as well as other contentions of the petitioners), and found them to be without merit. Importantly, the Circuit Judges, Hon. Ellsworth A. Van Graafeiland, Hon. Lawrence W. Pierce, and Hon. Inzer B. Wyatt, found there was a complete failure of proof on the issue that petitioners have raised, to wit, that the alleged torts were committed pursuant to some official policy or resulted from grossly negligent or deliberately indifferent lack of training. Furthermore, Officer Talt did not participate in the shooting, therefore, the case was properly dismissed as to him. The Circuit Judges

similarly disposed of petitioners' other arguments, affirming in all particulars the determination of the District Court and the jury.

The District Court was correct in dismissing the case as to defendants Talt and Nassau County as a *prima facie* case had not been made as to them.

At the close of the evidence, attorney for the respondents made a motion for a directed verdict. The trial court granted the motion as to defendants Talt and Nassau County. Respondents submit that this was proper under the law as a prima facie case had not been made as to them.

The case of *Monell v. New York City Dept. of Soc. Serv.*, 436 U.S. 658 (1978), is the landmark case dealing with the liability of municipalities under 42 U.S.C. Sec. 1983. The *Monell* case held, in substance, that municipalities are "persons" subject to liability under Sec. 1983 and may be sued for constitutional deprivations visited pursuant to governmental "custom," even where such custom has not received formal approval, as well as policy statements, ordinances, regulations or decisions officially adopted by the municipalities' officers. However, it is important to note that the holding in *Monell* provided that a municipality can not be held liable solely because it employs a tort-feasor, i.e., on a *respondeat superior* theory. Furthermore, a municipality can not be sued for an injury inflicted by an employee. It is only when the execution of a governmental policy inflicts injury that a municipality is liable.

The *Monell* case, *inter alia*, involved a claim that the Board of Education and the City of New York had made it

a matter of official policy to compel pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons, thus depriving the petitioners of their federally protected rights.

Applying the facts of the within case to the standards set forth in *Monell,* it can be determined that the County of Nassau could only be held liable, as a "person" subject to liability under Sec. 1983, if Officer Boyle shot Jay Parker in the execution of a policy or custom of the County of Nassau. The County could not be held in the case on a *respondeat superior* basis, i.e., that the police officer is an alleged tort-feasor. In this context, petitioners would have to show that there was a policy on the part of the County of Nassau to promote shooting black people, or to promote vigilant acts on the part of police officers with regard to black people. There is not even a *hint* of policy such as this, much less evidence to prove such a policy exists. Therefore, petitioners must fail under the *Monell* standards.

This Honorable Court further clarified the liability of municipalities in a 1983 action in the case of *Turpin v. Mailet,* 579 F. 2d 152 (2d Cir. 1978), *cert. den.* 439 U.S. 988, v. 439 U.S. 974, m. 591 F. 2d 426 (1979), 619 F. 2d 196 (2d Cir., 1980), *cert. den.* 449 U.S. 1016 (1980).

The *Turpin v. Mailet* case involved a claim against a municipality based on an allegation that the board of police commissioners had previously acted in such a way as to encourage expression of feelings of hostility against that particular plaintiff by reason of his previous altercations with the police. Such a situation is not true in the within case. There is nothing in the record to indicate any previous altercations with the Police Department of the

County of Nassau, much less any form of hostility encouraged by the Police Department of Nassau County, toward Jay Parker.

In the case of *Owens v. Haas*, 601 F. 2d 1242 (2d Cir., 1979), the Second Circuit held that the case should not have been dismissed at the *pleadings* stage. In remanding the case back to the District Court for further discovery, to elicit the facts, the Second Circuit held that a "* * * failure to train or supervise law enforcement officers must be so grossly negligent as to constitute 'deliberate indifference' in order to hold the County liable."

In the within case, there is absolutely no evidence in the record before the Court that would indicate that the County had exhibited "deliberate indifference" or "gross negligence" within the meaning of *Owens v. Haas*. In fact, Officer Boyle testified that he was on the police force some 18 years and had received training at the range in the use of weapons. Officer Boyle testified that this was the first use he had ever made of his weapon in his years on the police force. Officer Boyle also testified that he had been trained to take cover. Officer Boyle further testified that he believed Jay Parker was going to shoot him when he saw the gun in Jay Parker's hand.

The expert who testified on behalf of the petitioners, Ronald W. Hill, a New York City Police Officer assigned to the Police Academy of Fire Arms and Tactics, for the City of New York, testified that he uses the following six guidelines in instructing police officers at the Police Academy:

> "1. Use all reasonable means before utilizing firearm when effecting arrest for or preventing or terminating a felony or defending self or another.

"2. Do not fire warning shots.

"3. Do not discharge firearm to summon assistance except when safety is endangered.

"4. Do not discharge firearm from or at moving vehicle unless occupants are using deadly, physical force against officer or another, by means other than vehicles.

"5. Do not discharge firearm at dogs or other animals unless there is no other way to bring animal under control.

"6. Do not discharge firearm if innocent persons may be endangered."

It cannot be said that Officer Boyle acted in contravention of any of the guidelines specified by the petitioners' expert.

Furthermore, there is absolutely no evidence in this case that Officer Talt engaged in any breach of the decedent Parker's constitutional rights. By Officer Boyle's own admission, he fired the shots that resulted in Jay Parker's death. In fact, counsel so stipulated to that fact. Furthermore, the allegations by petitioners that Officers Talt and Boyle "wrongfully and illegally entered the County of Queens" are meaningless. Police officers of the County of Nassau may effectuate an arrest anywhere within the State of New York when said police officers have reasonable cause to believe a person has committed a crime. Both attempted robbery and unlawful possession of a gun are "crimes" requiring that a police officer go over the county border. There appears to be no argument on that point.

The trial court may properly grant a motion to dismiss at the close of the evidence where there is such a complete absence of evidence supporting the verdict that any result in favor of petitioners could only be the result of surmise, and conjecture. *Mattivi v. South African Marine Corp., "Huguenot,"* 618 F. 2d 163 (2d Cir., 1980). Respondents submit that such is true in the case at bar.

The holding set forth in the case of *Whitehurst v. Wright,* 592 F. 2d 834 (5th Cir., 1979), is applicable to the case at bar. In the *Whitehurst* case, an action was brought under the civil rights statutes by the decedent's mother on a claim that an alleged cover-up deprived her son of his constitutional rights. A directed verdict was granted for the defendant mayor and a jury verdict for the other defendants. In that case, evidence showed that the decedent was gunned down by a police officer who mistook him for a suspect in a robbery. The police officer claimed that the decedent shot first. None of the officers at the scene found a gun near the body, however, a detective subsequently called to the scene spotted a gun twenty-seven inches from the victim. It was later discovered the gun had been confiscated by the police in a drug raid one year prior to the shooting. The entire event precipitated the resignation of several officials of the City and several police officers. In spite of the blatant nature of the cover-up allegations, the 5th Circuit held that:

> "The trial court correctly ruled that the events occurring *post obitum* could form no part of the deceased's 42 U.S.C. Sec 1983 or Sec 1985 action. The essence of a claim under either section is the deprivation of a *person's* constitutional rights. Here, the events of the alleged cover-up took place after Bernard Whitehurst had been shot and killed" (592 F. 2d 834, 840).

The Court is also respectfully referred to the case of *Roe v. Wade*, 410 U.S. 113 (1973), wherein the Supreme Court held that a fetus is not a "person" within the meaning of the 14th amendment. Therefore, if a fetus who is capable of sustaining life in the future is not a considered "person," it follows that a corpse certainly cannot be considered a "person" with constitutional rights. After death, one is no longer a "person" within our statutory and constitutional framework and has no rights to which he may be deprived.

In the within case, the bald assertions of petitioners that there was a "cover-up" certainly do not even rise to the level of the *Whitehurst* case. The "cover-up" consisted of the fact that petitioners felt Jay Parker should have been brought to a New York City hospital since he was shot in New York City. The evidence conclusively showed that there were New York City police officers on the scene. However, no New York City ambulance had arrived, though the New York City ambulance had been summoned. Therefore, the Nassau County ambulance brought Jay Parker to the closest hospital, to wit, Franklin General Hospital, to give the boy every chance for survival. Furthermore, pursuant to law, an emergency medical technician may not pronounce a person dead even if there virtually was no question as to his condition. Since the death took place in Nassau County, an autopsy was performed there. However, since the incident took place in New York City, a Queens County Grand Jury convened to deal with the case. So where is the "cover-up"? Obviously, none exists; and even assuming, *arguendo*, there was a "cover-up", it would be *after* the fact and the Sec. 1983 action would fail as in the *Whitehurst* case.

This honorable Court is further referred to the decision of District Court Judge Kevin Thomas Duffy in the case of

Whitley v. City of New York, 518 F. Supp. 1318 (S.D.N.Y., 1981), wherein the court granted defendant City's motion for summary judgment holding that:

> "Whether Spooner was negligent in discharging his gun or committed intentional assault is an entirely separate matter for which conduct the City cannot be held liable under Sec 1983" (518 F. Supp 1318, 1321).

Certainly, in the within case, petitioners were given every opportunity to prove their case since the motion to dismiss as to defendants Talt and Nassau County was granted at the close of the evidence. Therefore, the determination of the trial judge should be upheld.

The question submitted to the jury in the form of a special verdict was proper in all respects.

Respondents respectfully submit that the question given to the jury was proper in all respects. Furthermore, the contention raised in the petition, to wit, that the question submitted to the jury in the form of a special verdict was an improper restriction of the issues requiring review by this Honorable Court, is merely appellate afterthought and nothing more.

In accordance with the law, Judge Pratt asked the jury to determine the following:

> "In short, you have heard the evidence, you have heard the arguments of counsel. What you have to determine in light of these instructions is whether the defendant Boyle reasonable believed that shooting Jay Parker was necessary to protect

himself or others from the imminent use of deadly force, and your answer to that question, you will report as either yes or no in the form of special verdicts which I will provide to you."

What petitioners fail to point out in their brief is that the question presented to the jury was given after the trial judge gave instructions on the law which comprised some thirty pages in the record. The jury was carefully instructed that the burden of proof with respect to the question rests upon Boyle, to show, by a fair preponderance of the credible evidence, that the claim he asserted is true. Furthermore, the jury was charged at length, using the language of the applicable statutes.

In the case of *Leathers v. United States,* 352 F. Supp. 1244 (E.D. Ark., 1971), the District Court Judge used special interrogatories. A motion was made by the defendant government for judgments notwithstanding the verdict, or alternatively for a new trial. The trial judge denied the motions and the case was thereafter affirmed by the Court of Appeals, 471 F. 2d 856 (8th Cir., 1972), *cert. den.* 412 U.S. 932 (1973).

In the case at bar, no motions or exceptions were taken by the petitioners' attorney during the trial. Similarly, petitioners' attorney made no motions after trial though the trial judge asked if there were any motions. Therefore, any complaint made by petitioners at this time is strictly appellate afterthought. In fact, the trial judge asked to see counsel at side bar *before* he sent the jury in for their deliberations. At side bar, the trial judge gave a copy of the special verdict to petitioners' attorney and asked if there were any additional requests or exceptions. No exceptions were taken. The only exception taken at that time

was by respondents, and that was in regard to the statutory definitions of a crime.

Furthermore, from his opening remarks to the jury, the trial judge indicated to counsel and the jury the nature of the case as he saw it and never once did the petitioners object. Any objections petitioners' attorney may raise at appellate level are too late, where no objections were raised in the Court below.

Petitioners also contend that "* * * the jury was not permitted to consider whether Boyle was negligent in failing to take cover, as his partner did, or in the manner in which he placed Jay Parker under control." This language and other language in the petition constitutes an attempt by petitioners' counsel to use negligence as the basis for a civil rights action. A cause of action under a civil rights statute is available to any person who under color of state law is deprived of a right, privilege or immunity secured by the constitution or federal law (see *Whitley v. City of New York, supra*). Negligence may not be a basis for a civil rights action. In fact negligence was not a basis for *any* cause of action specified in the verified complaint.

Indeed, the doctrine of pendent jurisdiction permits state causes of action to be tried in federal court, where there is a sufficient nexus to a federal cause of action. However, a litigant may not "piggyback" his state claims onto an unsuccessful federal claim.

Furthermore, the arguments set forth by petitioners are in effect duplicitous. On the one hand, petitioners claim the County did not train their police officers properly. On the other hand, petitioners state that Officer Boyle acted negligently in not taking cover, which is what he was

trained to do. Either argument must fail for the following reasons. To succeed in a 1983 action, a litigant must establish gross negligence at the very least. This had not been proven in the within case. Furthermore, any alleged negligence on the part of Officer Boyle is irrelevant to the within civil rights action.

In summation, the crux of the issue, the central issue, the only issue to be determined by the jury was set forth properly in the charge and should not be disturbed. To put it another way, Officer Boyle shot and killed Jay Parker, that much is given. It is then up to Officer Boyle to prove his claim that he reasonably believed that shooting Jay Parker was necessary to protect himself or others from the imminent use of deadly force. The jury determined rightfully that Officer Boyle reasonably believed the shooting was in fact necessary and their determination should be upheld.

The holding in the case of *R. H. Baker & Co. v. Smith-Blair, Inc.*, 331 F. 2d 506 (9th Cir., 1964), is directly on point as regards to this issue. The case holds in pertinent part:

> "Appellants proposed an instruction that changes in 'form' as distinguished from those of 'substance' or 'principle' were unimportant in determining infringement. Assuming the instruction was otherwise unobjectionable, the court properly concluded that it was inappropriate since in this case the jury was not asked to determine the broad issue of infringement as such, and the instruction was not necessary to an understanding of the specific questions which the jury was asked to answer. Appellants' proposed instruction as to the

> doctrine of equivalency was properly refused for the same reason. 'Use of the special verdict eliminates the necessity for and use of complicated instructions on the law, which are a normal concomitant of the general verdict'. 5 Moore's Federal Practice 2207 (2d ed. 1951)" (331 F. 2d 506, 511).

It is clear that the question submitted to the jury in the form of a special verdict was proper in all respects. The jury rightfully determined that Officer Boyle reasonably believed the shooting was necessary to protect himself or others from the imminent use of deadly force, and their determination should be upheld.

The trial court did not commit reversible error in quashing petitioners' *subpoena duces tecum* for the production of the F.B.I. file regarding its investigation into the death of Jay Parker.

Subsequent to the shooting of Jay Parker, the Federal Bureau of Investigation and Department of Justice conducted an investigation to ascertain whether decedent's civil rights had in fact been violated. Petitioners brought by order to show cause a motion to compel the production of the entire F.B.I. file. Respondents were never served with the order to show cause; though it was specified that they be served in the order to show cause. Petitioners thereafter served a *subpoena duces tecum* to produce the entire F.B.I. investigation file. Again, respondents were never advised of this request. However, the Assistant U.S. Attorney appeared and moved to quash the subpoena.

The court chose not to address the technical argument that the Assistant U.S. Attorney was not the proper subject of a *subpoena*. The judge instead chose to address the substantive argument that was made based upon 28 CFR

16.21, a regulation established by the Justice Department. The regulation places the matter in the government's discretion as to whether or not they will respond to *subpoena.* In the case of *United States v. Ragen,* 340 U.S. 462 (1951), the Supreme Court upheld the validity of the government making internal regulations respecting disclosure. The court was informed that the materials requested by the petitioners contained statements of witnesses and 302 interview reports prepared by F.B.I. agents. The F.B.I. voluntariy disclosed that there were no statements or interviews of the individual defendants in the file.

The primary issues raised by the government included the breadth of the *subpoena,* the quantity of documents and problems related to an informer's privilege. None of the material would be directly admissible. The material sought could only be used on credibility issues and the witnesses had already testified at examinations before trial, in the grand jury and during pre-trial.

Furthermore, it appears clear that the requested information would not be available under the Freedom of Information Law. The standing of one who seeks access to records is a member of the public, and his position is not enhanced because he is a litigant or potential litigant. In the recent decision of *FBI v. Abramson,* ____ US ____, 72 L. Ed 2d 376 (1982), the Supreme Court held that Exemption 7 of the Freedom of Information Act (5 USC 552 [b] [7]) also exempts information originally contained in law enforcement records and thereafter incorporated into a document not compiled for law enforcement purposes.

Petitioners' attempt to persuade this court that the main reason the trial judge denied the motion was that it came

on very late. This is not the case in any respect. Judge Pratt specifically stated that the other factors were adequate to warrant denial of the motion. The trial judge gave a rather lengthy and complete discussion on why he had denied petitioners' request.

In short, the trial judge properly granted the motion to quash the *subpoena* and his determination was properly upheld by the United States Court of Appeals.

II.

There is no conflict of decision.

Respondents respectfully submit that there is no conflict of decision in the within case. All of the cases set forth in petitioners' brief, be they from the Circuit Courts, the District Courts or this Honorable Court, all point to the same standards in determining whether an individual's constitutional rights have been violated.

It must be emphasized that the District Court and the Second Circuit applied the necessary law and found that, in this case, there had been a complete failure of proof as to the County and Officer Talt. The transcript in the within case bears out this fact. Furthermore, the jury verdict in favor of Officer Boyle was correct.

For the reasons set forth above, none of the rulings of the District Court Judge "give rise to important questions of Federal Law," as petitioners allege in their petition.

III.

There is no substantial question of constitutional dimension.

Clearly, the attempt by petitioners to couch their petition in terms of a violation of the United States Constitution is without merit. As set forth above, there are no issues herein which necessitate review by this Court. All of the arguments are merely a restatement of the arguments presented to the Second Circuit. Those arguments were rejected by the United States Court of Appeals for the Second Circuit. Therefore, the respondents submit that the determinations of the District Court affirmed by the United States Court of Appeals for the Second Circuit are in accordance with the controlling principles of Federal Law.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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